

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

LEONARD CARTER,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of  
Social Security,

Defendant.

NO. C10-999-TSZ-JPD

REPORT AND  
RECOMMENDATION

Plaintiff Leonard Carter appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied his applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be AFFIRMED and that this case be dismissed with prejudice.

**I. FACTS AND PROCEDURAL HISTORY**

At the time of his administrative hearing, plaintiff was a 49 year-old man with a high school degree and some college education. Administrative Record (“AR”) at 286, 288. His past work experience includes employment as a telemarketer. AR at 23. Plaintiff was last

1 gainfully employed as a telemarketer for the Seattle Times, until he was terminated from his  
2 position for reasons involving disputes with a co-worker. AR at 293.

3 On September 12, 2005, plaintiff filed a claim for DIB. On February 23, 2006, he filed  
4 an application for SSI payments, alleging an onset date of March 22, 2005. AR at 20. Plaintiff  
5 asserts that he is disabled due to soft tissue impairment in the lower left extremity, obesity,  
6 depressive/adjustment disorder, and schizoid personality disorder. AR at 22.

7 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 20.  
8 Plaintiff requested a hearing which took place on January 11, 2008. AR at 282-314. On May  
9 30, 2008, the ALJ issued a decision finding plaintiff not disabled and denied benefits based on  
10 his finding that plaintiff could perform a specific job existing in significant numbers in the  
11 national economy. AR at 20-29. Plaintiff's administrative appeal of the ALJ's decision was  
12 denied by the Appeals Council on May 21, 2010, AR at 5-8, making the ALJ's ruling the "final  
13 decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On June 17,  
14 2010, plaintiff timely filed the present action challenging the Commissioner's decision. Dkt.  
15 No. 5.

## 16 II. JURISDICTION

17 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
18 405(g) and 1383(c)(3).

## 19 III. STANDARD OF REVIEW

20 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
21 social security benefits when the ALJ's findings are based on legal error or not supported by  
22 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
23 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
24 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
25 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
26 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in

1 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
 2 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a  
 3 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
 4 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
 5 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
 6 must be upheld. *Id.*

7 The Court may direct an award of benefits where "the record has been fully developed  
 8 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
 9 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292  
 10 (9th Cir. 1996)). The Court may find that this occurs when:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting  
 12 the claimant's evidence; (2) there are no outstanding issues that must be  
 13 resolved before a determination of disability can be made; and (3) it is clear  
 14 from the record that the ALJ would be required to find the claimant disabled if  
 he considered the claimant's evidence.

15 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
 16 erroneously rejected evidence may be credited when all three elements are met).

#### 17 IV. EVALUATING DISABILITY

18 As the claimant, Mr. Carter bears the burden of proving that he is disabled within the  
 19 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
 20 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
 21 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
 22 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
 23 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are  
 24 of such severity that he is unable to do his previous work, and cannot, considering his age,  
 25 education, and work experience, engage in any other substantial gainful activity existing in the  
 26

1 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-  
2 99 (9th Cir. 1999).

3 The Commissioner has established a five step sequential evaluation process for  
4 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
5 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
6 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
7 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
8 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.  
9 §§ 404.1520(b), 416.920(b).<sup>1</sup> If he is, disability benefits are denied. If he is not, the  
10 Commissioner proceeds to step two. At step two, the claimant must establish that he has one  
11 or more medically severe impairments, or combination of impairments, that limit his physical  
12 or mental ability to do basic work activities. If the claimant does not have such impairments,  
13 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
14 impairment, the Commissioner moves to step three to determine whether the impairment meets  
15 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
16 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
17 twelve-month duration requirement is disabled. *Id.*

18 When the claimant’s impairment neither meets nor equals one of the impairments listed  
19 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
20 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
21 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work  
22 to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
23 the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true,  
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25 <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
26 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

1 then the burden shifts to the Commissioner at step five to show that the claimant can perform  
 2 other work that exists in significant numbers in the national economy, taking into consideration  
 3 the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g),  
 4 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable  
 5 to perform other work, then the claimant is found disabled and benefits may be awarded.

## 6 V. DECISION BELOW

7 On May 30, 2008, the ALJ issued a decision finding the following:

- 8 1. The claimant meets the insured status requirements of the Social  
 9 Security Act through December 31, 2011.
- 10 2. The claimant engaged in substantial gainful activity after the alleged  
 11 onset date of March 22, 2005.
- 12 3. The claimant has the following severe impairments; soft tissue  
 13 impaired in the lower left extremity, obesity, a depressive/adjustment  
 14 disorder, and a schizoid personality disorder schizoid.
- 15 4. The claimant does not have an impairment or combination of  
 16 impairments that meets or medically equals one of the listed  
 17 impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 18 5. After careful consideration of the entire record, I find that the claimant  
 19 has the residual functional capacity to perform the full range of light  
 20 work as defined in 20 CFR 404.1567(b) and 416.967(b). Specifically,  
 21 the claimant can lift and/or carry 20 pounds occasionally and 10  
 22 pounds frequently. The claimant can stand and/or walk for 6 hours  
 23 and has no sitting limitations. The claimant does not need an assistive  
 24 device indoors, but may need one if he walks long distances for  
 25 prolonged periods of time. He can occasionally squat, crouch, and  
 26 crawl. He may have limitations with climbing ladders and working at  
 heights. As to mental residual functional capacity, the claimant could  
 not work in a team situation with others or tolerate oversight in excess  
 of normal.
6. The claimant is capable of performing past relevant work as a  
 telemarketer. This work does not require the performance of work-  
 related activities precluded by the claimant's residual functional  
 capacity.

7. The claimant has not been under a disability, as defined in the Social Security Act, from March 22, 2005 through the date of this decision.

AR at 22-28.

## VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. Did the ALJ err in making an adverse credibility determination?
2. Did the ALJ err in his review of the medical evidence, and particularly that of Dr. Czysz?
3. Should the ALJ have ordered a more fully-developed medical record?

Dkt. No. 15 at 1-2.

## VII. DISCUSSION

### A. The ALJ Did Not Err in Making An Adverse Credibility Assessment

In his opinion, the ALJ concluded that the plaintiff's medically determinable impairments could reasonably be expected to produce some of the symptoms about which plaintiff complained, but his statements concerning the "intensity, persistence and limiting effects of these symptoms are not credible...." AR at 25. The ALJ found credibility to be lacking because his testimony and actions were not consistent with his claims of disability, that he was previously convicted and incarcerated for a prior act of dishonesty (welfare fraud), that his symptoms were not consistent with medical evidence, that he engaged in fairly conservative medical treatment that would indicate symptoms were not as severe as alleged. AR at 25-27. Plaintiff objects on several grounds to the findings.

#### 1. *Standards for Reviewing Adverse Credibility Determinations*

Credibility determinations are particularly the province of the ALJ. *Andrews*, 53 F.3d at 1043. Nevertheless, when an ALJ discredits a claimant's subjective testimony, he must articulate specific and adequate reasons for doing so. *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006). The determination of whether to accept a claimant's subjective symptom

testimony requires a two-step analysis. 20 C.F.R. § 404.1529; *Smolen*, 80 F.3d at 1281; SSR 96-7p. First, the ALJ must determine whether there is a medically-determinable impairment that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R. § 404.1529(b); *Smolen*, 80 F.3d at 1281-82; SSR 96-7p. Once a claimant produces medical evidence of an underlying impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms solely because they are unsupported by objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc). Absent affirmative evidence that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at 1284; *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)

When evaluating a claimant's credibility, the ALJ "must specifically identify what testimony is credible and what testimony undermines the claimant's complaints." *Greger*, 464 F.3d at 972 (internal quotation omitted). General findings are insufficient. *Reddick*, 157 F.3d at 722. The ALJ may consider "ordinary techniques of credibility evaluation" including the claimant's reputation for truthfulness, inconsistencies in his testimony or between his testimony and conduct, his daily activities, work record, and testimony from physicians and third parties concerning the nature, severity, and effect of the symptoms of which the claimant complains. *Smolen*, 80 F.3d at 1284.

## 2. *Reasons for Mr. Carter's Termination from Seattle Times*

The ALJ concluded that plaintiff was terminated from the Seattle Times telemarketer position based on racial tension issues, rather than performance. The ALJ noted

During a consultative mental evaluation with Alan Breen, Ph.D., the claimant alleged that he was let go from his job because of racial issues, not because of his performance. He said that if he was not let go, he would have continued working. He further indicated that if he was able to relocate back to San Francisco he could get a job as a telemarketer. He indicated that housing issues prevented him from moving, not any mental or physical limitations. Such statements weaken the credibility of the claimant's allegations of more limiting symptoms.

1 AR at 25-26. Plaintiff claims this was error because these statements by plaintiff do not pass  
2 the common sense test. Dkt. 15 at 4-5. Plaintiff does not argue that Dr. Breen erred in his  
3 reporting that these statements are attributable to plaintiff. Moreover, the reported rationale for  
4 his termination as set forth in Dr. Breen's opinion (racial issues as opposed to performance  
5 issues) was repeated by the plaintiff at the administrative hearing. AR at 293-95.

6 The statements by plaintiff directly contradict his testimony that he could not work with  
7 anyone. The fact that he stopped working for reasons other than his impairments is a sufficient  
8 reason to discount his credibility. *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001).  
9 The ALJ did not err by finding the plaintiff to be less than completely credible by reliance on  
10 his own testimony and the inconsistencies with his claimed impairment.

11 3. *Continued Work After Onset Date*

12 Plaintiff continued to work at the Seattle Times after his alleged onset date in March  
13 2005. He did so until he was terminated in February 2006, although his work was on a part  
14 time basis. He worked a regular part-time schedule for 5 days a week for nearly a year after  
15 his alleged onset date, and the ALJ found that this indicated the plaintiff was not as limited as  
16 alleged. AR at 26. Plaintiff asserts that this is speculation on the part of the ALJ, reflects  
17 plaintiff's misunderstanding of the intricacies of the SSA system, and that the ALJ should have  
18 asked the plaintiff about this at his administrative hearing rather than speculate about the  
19 significance of the issue. Dkt. 15 at 5. The ability to maintain employment with "a fair  
20 amount of success" during an alleged period of disability demonstrates that the plaintiff's  
21 impairments did not restrict his ability to work to the point of disability. *Drouin v. Sullivan*,  
22 966 F.2d 1255, 1258 (9th Cir. 1992). Because he alleged he was unable to work due to his  
23 disabilities as of March 2005, but continued to do so until he was terminated in February 2006,  
24 the ALJ did not err in his conclusion that plaintiff's abilities were not as limited as he alleged.



1                   4.       *Felony Conviction*

2           Mr. Carter was convicted of welfare fraud sometime in the 1980's. AR at 302.  
3   Although plaintiff acknowledges that a felony conviction can be considered in determining  
4   credibility, he asserts that the ALJ erred by not placing it in context, and that there must be a  
5   causal connection between a crime that occurred so far in the past and the current time. Dkt.  
6   No. 15 at 5-6.

7           The weight to be accorded to any fact that bears on credibility is a judgment to be made  
8   by the ALJ, and not this Court. *Andrews*, 53 F.3d at 1039. If this were the sole basis for the  
9   adverse credibility determination, then the plaintiff's argument might have merit. It was not,  
10   however, the sole basis for the decision. The ALJ did not err.

11                   5.       *Dr. Wainstein Report*

12           In assessing plaintiff's credibility, the ALJ also referenced the consulting examination  
13   and report dated February 13, 2006 by Luis Wainstein, M.D. AR at 225-31. Dr. Wainstein's  
14   report generally indicated plaintiff could do much more than he stated, and also raised issues as  
15   to whether a person who claimed to be as disabled as plaintiff asserted would not be using  
16   medication stronger than over-the-counter Advil. He found that although plaintiff claimed he  
17   could only sit for an hour at a time, but was never comfortable when even so limited, plaintiff  
18   sat during the interview, without moving and in the same position. AR at 228. He also had no  
19   difficulties getting on or off the examination table, lying down or sitting up. Moreover, when  
20   he removed his shoes and socks, he did so bending over using his upper extremities.

21           An ALJ may rely upon a physician's observations that complaints were inconsistent  
22   with his demonstrated abilities to support an adverse credibility determination. *Batson v.*  
23   *Comm'r of Soc. Sec.*, 359 F. 3d 1190, 1196 (9th Cir. 2004). This is what the ALJ did. He did  
24   not err.

25                   6.       *Secondary Gain and Conservative Treatment*

26           The ALJ also noted:

1 As to mental symptoms, the consultative evaluations overall do not support  
2 claimant's allegations of more limiting symptoms. Dr. Breen found the  
3 claimant to be functionally intact and gave a GAF score of 55, indicating only  
4 moderate symptoms. As discussed below, the claimant also performed well on  
5 subsequent examinations. It is noted that the evaluations in the record occurred  
6 as part of the claimant's effort to obtain secondary gain. The claimant did not  
7 engage in any mental health treatment, including no medications and no  
8 counseling since the alleged onset date.

9 If the claimant's physical and mental symptoms were as limiting as alleged, one  
10 would expect greater effort to alleviate his conditions.

11 AR at 26. Plaintiff argues that the ALJ erred by finding the plaintiff less than credible merely  
12 because he was seeking Social Security benefits (e.g., "secondary gain"). If this were true,  
13 then plaintiff's assessment of error would be well-founded. *Ratto v. Sec. Dep't Health and*  
14 *Human Svcs.*, 839 F. Supp. 1415, 1428-29 (D. Or. 1993). However, this was not the point of  
15 the ALJ's comments. The ALJ mentioned this to show the absence of long-standing serious  
16 conditions, and that the reasons the reports were contained in the record was not because of  
17 continuous treatment, but rather because the evaluations were ordered as part of the disability  
18 evaluation process. This was not error.

19 Consistent with this, the ALJ pointed out that the treatment that plaintiff was receiving  
20 was very conservative, indicating almost no treatment for his mental impairments.  
21 Conservative (or nonexistent) treatment is a legitimate basis to discount the plaintiff's  
22 testimony as to the severity of his impairment. *Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir.  
23 2007). Plaintiff argues that mental health issues are well-recognized for their lack of treatment,  
24 citing *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1996). While this may be true, it does  
25 not follow that the ALJ is required to ignore the principles set forth in *Parra* in all cases  
26 involving mental health issues. It is not an all or nothing proposition. The ALJ devoted a  
lengthy portion of his opinion on the credibility assessment, and the conservative (or  
nonexistent) aspect of plaintiff's mental health treatment was only on small portion of his  
analysis. When considered in conjunction with the other issues raised, the Court cannot

1 conclude that the ALJ erred in his adverse credibility determination by relying, in part, on this  
2 factor.

3 7. *Conclusion Regarding Credibility*

4 As noted at the outset, credibility determinations are particularly within the province of  
5 the ALJ. Here, the ALJ carefully considered the evidence, and supported his adverse  
6 credibility decision with a detailed examination of the record. The ALJ did not err, and his  
7 credibility determination must be affirmed.

8 B. The ALJ Erred/Did Not Err in His Assessment of the Medical Evidence

9 1. *Standards for Review*

10 As a matter of law, more weight is given to a treating physician's opinion than to that  
11 of a non-treating physician because a treating physician "is employed to cure and has a greater  
12 opportunity to know and observe the patient as an individual." *Magallanes*, 881 F.2d at 751;  
13 *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating physician's opinion,  
14 however, is not necessarily conclusive as to either a physical condition or the ultimate issue of  
15 disability, and can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881  
16 F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must  
17 give clear and convincing reasons for doing so if the opinion is not contradicted by other  
18 evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725  
19 (9th Cir. 1988). "This can be done by setting out a detailed and thorough summary of the facts  
20 and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Id.*  
21 (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his  
22 conclusions. "He must set forth his own interpretations and explain why they, rather than the  
23 doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).  
24 Such conclusions must at all times be supported by substantial evidence. *Reddick*, 157 F.3d at  
25 725.

1 The opinions of examining physicians are to be given more weight than non-examining  
2 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the  
3 uncontradicted opinions of examining physicians may not be rejected without clear and  
4 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining  
5 physician only by providing specific and legitimate reasons that are supported by the record.  
6 *Bayliss*, 427 F.3d at 1216.

7 Opinions from non-examining medical sources are to be given less weight than treating  
8 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the  
9 opinions from such sources and may not simply ignore them. In other words, an ALJ must  
10 evaluate the opinion of a non-examining source and explain the weight given to it. SSR 96-6p,  
11 1996 WL 374180, at \*2. Although an ALJ generally gives more weight to an examining  
12 doctor's opinion than to a non-examining doctor's opinion, a non-examining doctor's opinion  
13 may nonetheless constitute substantial evidence if it is consistent with other independent  
14 evidence in the record. *Thomas*, 278 F.3d at 957; *Orn*, 495 F.3d at 632-33.

15 2. *James Czysz*

16 Plaintiff claims the ALJ erred in his assessment of the medical opinions of James  
17 Czysz, Psy.D., who examined plaintiff on three occasions. The ALJ gave little weight to the  
18 opinions of Dr. Czysz, in part based upon the evaluation of Dr. Alan Breen and in part on the  
19 testing administered by Dr. Czysz, stating:

20 I considered Dr. Breen's medical opinion that the claimant was intact as to  
21 cognitive, social, and adaptive functioning and GAF score of 55, indicating only  
22 moderate symptoms. This is consistent with Dr. Breen's contemporaneous  
23 examination of the claimant. The claimant presented with logical and organized  
24 thinking. Dr. Breen reported that his affect was somewhat expansive and that  
25 he displayed only mildly pressured speech. The psychologist noted that the  
26 claimant seemed to enjoy talking and conversation. The claimant scored a  
28/30 on the mini mental status exam and basic information appeared intact. As  
an examining source, great weight is accorded to Dr. Breen's medical opinion.

1 Consideration was also given to check the box forms prepared by James Czysz,  
2 Psy.D., for the Washington State's Department of Social and Health Services  
3 (DSHS). In those forms, the psychologist indicated moderate cognitive  
4 limitations as to handling simple and complex instructions and learning new  
5 tasks, as well as a severe limitation as to exercising judgment and making  
6 decisions. While the claimant may have been difficult to redirect as the  
7 psychologist noted, such limitations are inconsistent with the overall record as  
8 evidenced by the claimant's participation during the consultative evaluations  
9 discussed above. Also, on the Neurobehavioral Cognitive State Exam  
10 (COGNISTAT), the claimant scored within normal limits on all domains of  
11 functioning. Therefore, little weight is given. As to social limitations, some  
12 weight is given to the limitations as to working with others and is accounted for  
13 in the residual functional capacity determined here.

14 I also considered Dr. Cyysz's (sic) 2008 statement that the claimant's increased  
15 stress since losing his job has caused "significant decompensation" and that his  
16 social skills have been "quite compromised", as well as, a low GAF score of 45.  
17 For several reasons, little weight is given to those comments and score.  
18 Although the psychologist examined the claimant on two prior occasions, he did  
19 not treat the claimant. His statements do not bear a longitudinal perspective of  
20 the claimant's conditions as a treating source. Additionally, those comments  
21 are not supported by contemporaneous testing. On the COGNISTAT, the  
22 claimant was grossly unimpaired in all measured domains of functioning. He  
23 was fully alert and oriented in all spheres. His attention span was grossly intact  
24 as measured by his ability to repeat five digits forward. His memory was in the  
25 average range as shown by his ability to recall 3 out of 4 words without cueing  
26 and to recall the 4th word with cueing. On the Trailmaking tests of  
Attention/Concentration, his scores were within normal limits. His performance  
on cognitive instruments was similar to the scores of no impairment that he  
received in March 2007. The psychologist noted that the difficulties with  
redirection may have been from a failure to establish sufficient rapport. Further,  
the claimant's scores on the Personality Assessment Inventory were invalid. I  
suspect the claimant may have exaggerated his symptoms in an effort to obtain  
benefits. That examination occurred post hearing, a time in which the claimant  
was fully aware that a disability determination may hinge on the results of his  
testing.

27 AR at 27-8 (record references deleted). Plaintiff claims the ALJ erred by crediting Dr. Breen's  
28 evaluation and discounting Dr. Czysz's evaluations. Both physicians are considered  
29 examining physicians. As noted above, the opinion of an examining physician may be rejected  
30 by the ALJ for specific and legitimate reasons supported by the record.

1 Plaintiff's principal with Dr. Breen's report is that it was a one-time evaluation, that he  
2 was evaluated by Dr. Czysz three times, and the ALJ neglected to deal with Dr. Breen's  
3 statement that additional testing was needed. Dkt. No. 15 at 9. However, the number of  
4 evaluations is not dispositive, and there was additional testing – namely administration of the  
5 COGNISTAT test by Dr. Czysz, which was heavily relied upon by the ALJ. The  
6 COGNISTAT test, which measures neurobehavioral cognitive issues was administered by Dr.  
7 Czysz in March 2007, revealed that plaintiff's abilities in levels of consciousness, orientation,  
8 attention, comprehension, repetition, naming, constructions, memory, calculations, reasoning  
9 similarities and reasoning judgment were all within normal limits. AR at 240, 242.

10 The ALJ provided specific and legitimate reasons for discounting the opinions of Dr.  
11 Czysz. Dr. Breen's evaluation was consistent with the details in his report, and ultimately  
12 consistent with the results of the COGNISTAT test. In addition, he concluded that the ultimate  
13 opinion of Dr. Czysz was contradicted by the results of the test. Determining that a medical  
14 opinion is contradicted by the same physician's notes or observations or tests constitutes  
15 specific and legitimate reasons to discount the opinions of a physician. *Bayliss v. Barnhart*,  
16 427 F.3d 1211, 1216 (9th Cir. 2005).

17 The role of this Court is limited. As noted above, the Court may neither reweigh the  
18 evidence nor substitute its judgment for that of the Commissioner. *Thomas*, 278 F.3d at 954.  
19 When the evidence is susceptible to more than one rational interpretation, it is the  
20 Commissioner's conclusion that must be upheld. *Id.* It is possible to interpret the medical  
21 evidence as urged by plaintiff. However, the plaintiff's interpretation is, by no means, the only  
22 rational interpretation of the medical evidence. The ALJ did not err in his evaluation of the  
23 medical evidence.

24 C. The ALJ Did Not Err in His Treatment of Vocational Counselor Shields

25 In November 2006, DSHS Vocational Rehabilitation Counselor submitted a letter to the  
26 SSA, stating in part "after discussion with him and reviewing available medical information,

1 we do not feel he is employable at this time, and the prognosis for successful employment in  
2 the future is quite guarded.” AR at 155. In addition, the letter noted “...a psychiatric  
3 evaluation done in April 2006 indicates significant depression, along with interpersonal  
4 difficulties to the extent that securing and holding employment is unlikely. Based on my  
5 meeting with Mr. Carter today, it is my professional opinion that his depression and mental  
6 health challenges continue to be severe barriers to employment.” *Id.*

7 The ALJ concluded that “Mr. Shiels stated that the claimant was not employable due to  
8 his leg condition and depression. This comment is not supported by the record as thoroughly  
9 discussed above.” AR at 23. Plaintiff claims that was error, and this should have required  
10 further development of the record. The ALJ did not err. The letter from Mr. Shiels is based in  
11 large part on Dr. Czynsz’s 2006 evaluation. As noted above, the ALJ did not err in discounting  
12 Dr. Czynsz’s report and evaluation. In addition, Mr. Shiels’ letter also referred to physical  
13 difficulties faced by plaintiff as an indication of his alleged disability. However, no error has  
14 been assigned to the ALJ’s determination that plaintiff did not suffer from physical  
15 impairments that would render him disabled.

16 D. The ALJ Did Not Fail To Develop the Record

17 The plaintiff also argues that the ALJ should have ordered further tests to develop the  
18 record. When the record is ambiguous, equivocal, or inadequate, the ALJ has a duty to assist  
19 in developing the medical record. *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001).  
20 This can be especially true in cases involving mental impairments. *DeLorme v. Sullivan*, 924  
21 F.2d 841, 849 (9th Cir. 1991).

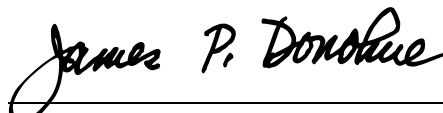
22 Plaintiff argues that in light of Dr. Breen’s 2006 report recommending further testing,  
23 the ALJ should have ordered additional medical review to develop the medical record.  
24 However, this ignores the impact of the later administered COGNISTAT test. In addition, the  
25 ALJ gave serious consideration as to whether additional testing was necessary. Ultimately, he  
26

1 concluded it was not. AR 309-11. There is no basis to conclude that the ALJ erred in making  
2 the decision that the record was appropriately developed.

3  
4 VIII. CONCLUSION

5 For the foregoing reasons, the Court recommends that Commissioner's decision be  
6 AFFIRMED and that this case be dismissed with prejudice. A proposed order accompanies  
7 this Report and Recommendation.

8 DATED this 7th day of December, 2010.

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10 JAMES P. DONOHUE  
11 United States Magistrate Judge  
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